IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 523

ESTATE OF HAROLD I. PRATT, Deceased, UNITED STATES TRUST COMPANY OF NEW YORK and HARRIET BARNES PRATT, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

ROLAND L. REDMOND,
Counsel for the Petitioners.

THE COURT PRESS, N. Y. C.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

United States Trust Company of New York and Harriet Barnes Pratt, Executors of the Estate of Harold I. Pratt, deceased, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on June 27, 1946, affirming a decision of The Tax Court of the United States.

Opinions Below

The majority (R. 71) and dissenting (R. 86) opinions of the Tax Court are reported in 5 T. C. 881. The *per curiam* opinion of the Circuit Court of Ap-

peals for the Second Circuit (R. 102) is reported in 155 F. (2d) ——.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 27, 1946 (R. 103). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether Section 811 (c) of the Internal Revenue Code, in so far as it requires that the value of the corpus of an *inter vivos* trust created January 15, 1903, be included in the gross estate of the decedent, is retroactive, void and in contravention of the Constitution of the United States where (1) the transfer in trust was not made in contemplation of death, and (2) at the time the transfer in trust was made there was no statute imposing an estate tax.

Constitutional Provisions and Statute Involved

The Fifth Amendment to the Constitution and the appropriate sections of the Internal Revenue Code are set forth in the Appendix (*infra,* pp. 11-12).

Statement of Matter Involved

This case involves a federal estate tax deficiency asserted against the estate of Harold I. Pratt, who died testate on May 21, 1939, at the age of 62 years.

The pertinent facts as stipulated before The Tax Court may be summarized as follows:

The decedent transferred certain property in trust for the benefit of himself and remaindermen by an indenture executed in the State of New York under date of January 15, 1903. Under this indenture, the trust term was measured by the lives of a nephew and niece of decedent and the survivor of them. During the trust term the income, so far as here material, was to be paid to the decedent during his life and upon his death to his issue from time to time living, in equal shares, *per stirpes.* Upon the expiration of the trust term the principal of the trust was to be transferred to the decedent if then living, or in case of his prior death to his issue then living *per stirpes,* or in default of the foregoing to the issue of decedent's father then living *per stirpes* (R. 73-74). It was stipulated that this transfer was not made in contemplation of death (R. 55). At the time of the decedent's death, one of the measuring lives had died but Mary R. B. Ladd the other measuring life, who was born on April 27, 1887, was living, and the trust had not terminated (R. 74).

The Commissioner determined that the value of the property constituting the principal of the *inter vivos* trust should be included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after his death under the provisions of Section 811(c) of the Internal Revenue Code (R. 13).

The Tax Court upheld the Commissioner's determination, with six judges dissenting on the ground that the case was indistinguishable from *Nichols* v. *Coolidge,* 274 U. S. 531 (1927) (R. 71-88).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the Tax Court and rejected the contention of petitioners that where an *inter vivos* trust was created prior to the enactment of the federal estate tax in 1916, the inclusion of the value of the trust property in the gross estate of the decedent would violate the Fifth Amendment (R. 102).

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the corpus of the trust created in 1903 is includible in the gross estate of the decedent under Section 811(c) of the Internal Revenue Code (R. 94).

2. In failing to hold that Section 811(c) of the Internal Revenue Code violates the Fifth Amendment to the Constitution of the United States in so far as it requires that property irrevocably transferred by the decedent before the enactment of the federal estate tax and not in contemplation of death shall be included in his gross estate (R. 95).

3. In affirming the decision of the Tax Court of the United States (R. 102).

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with *Nichols* v. *Coolidge*, 274 U. S. 531 (1927).

The *Coolidge* case involved an *inter vivos* trust created in 1907 by the decedent and her husband. The

trust instrument provided that the income of the trust was to be paid in certain proportions to the two settlors during their joint lives and thereafter solely to the survivor.[1] On the death of the survivor, the trustees were directed to distribute the corpus equally among the settlors' five surviving sons and the heirs of such of them as died during the trust term, such heirs to be determined in accordance with the statute of distribution in effect at the death of the surviving settlor, provided no widow of a deceased son should take more than one-half of her husband's share.

The Commissioner included in Mrs. Coolidge's gross estate, as a transfer taking effect at or after her death, the value of the part of the corpus of the trust which she had transferred to the trustees.

The District Court found that the transfer in trust took effect in possession or enjoyment at or after the decedent's death, saying:

> "The interest of the sons, therefore, was not a contingent interest, but rather a vested interest, liable to be divested by death before the death of the survivor of the parents. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the termination of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent."
>
> *Coolidge* v. *Nichols,* 4 F. (2d) 112 (1925), at p. 115.

[1] In 1917 the settlors assigned to their five sons their interest in the trust fund including the right to receive income therefrom. Each son and his representatives in the case of his death was thereafter entitled to one-fifth of the income of the trust.

It also found that Section 402(c) of the Revenue Act of 1918 (the predecessor of Section 811(c) of the Internal Revenue Code) was intended to be applied to transfers whenever made, but it refused to include any part of the trust property in Mrs. Coolidge's gross estate on the ground that the statute was unconstitutional under the Fifth Amendment to the extent that it applied to transfers made before the federal estate tax was enacted.

On appeal, this Court affirmed the decision of the District Court basing its opinion squarely on the unconstitutionality of the statute. It said:

> "The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?
>
> * * * *
>
> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. (Citing cases) And we must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of the property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."
>
> *Nichols* v. *Coolidge*, 274 U. S. 531 (1927) at pp. 542-543.

Since the decision of the *Coolidge* case, this Court has not had occasion to pass upon the constitutionality of Section 811(c) or its predecessors as applied to a transfer made prior to September 8, 1916, the effective date of the federal estate tax. It has, however, on numerous occasions considered the constitutionality of retroactive taxes and has consistently cited *Nichols* v. *Coolidge, supra,* with approval[1] and as authority for the proposition that when a tax is imposed upon a transaction made before the taxing statute was enacted and at a time when the taxpayer could not have anticipated the amount or the burden of the tax, it is so arbitrary as to offend the Fifth Amendment.

The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is, therefore, in direct conflict with *Nichols* v. *Coolidge, supra.*

2. The Circuit Court of Appeals for the Second Circuit decided the case at bar on the authority of its own decision in *Commissioner* v. *Flanders,* 111 F. (2d) 117 (1940), in which a trust created in 1915 but otherwise on all fours with the trust in the case at bar was held taxable.

In the *Flanders* case the Circuit Court of Appeals held that the transfer was taxable and distinguished the *Coolidge* case on the following grounds:

> "It is urged that the *Hallock* case involved a trust created after the estate tax law was en-

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[1] See *Milliken* v. *United States,* 283 U. S. 15, 20-21 (1931); *Reinecke* v. *Smith,* 289 U. S. 172, 175 (1933); *Helvering* v. *Helmholtz,* 296 U. S. 93, 97-98 (1935); *Hassett* v. *Welch,* 303 U. S. 303, 311 (1938); *Welch* v. *Henry,* 305 U. S. 134, 147 (1938); *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 43 (1939).

acted; and that to apply the statute retroactively to Trust No. 4 would be unconstitutional, as shown by *Nichols* v. *Coolidge, supra.* However, in the *Coolidge* case the settlor's death determined his life estate but did not take from him an interest in the corpus or augment the estate created in the remaindermen by the trust deed. In the case at bar, the remaindermen would have taken nothing had the settlor survived the terms of the trust; his death was the event that destroyed his possibility of reverter and brought into being remainders of which they had full dominion" (*Commissioner* v. *Flanders, supra,* at p. 121).

This statement in regard to the *Coolidge* case is erroneous on both the grounds which are relied on to distinguish it from the *Flanders* case.

(a) Mrs. Coolidge's death deprived her of a possibility of reverter in the corpus of the trust. The remainder interest of her sons was subject to divestment by their death during the trust term. If a son died during his parents' lifetime, the persons entitled to receive his share were "those who would be entitled to take his intestate property under the statute of distribution in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share" (*Coolidge* v. *Nichols, supra,* at p. 113).

It was, therefore, possible that a son, or even all the sons, might die without issue before the trust terminated. In that case the settlors, as the parents of such deceased son, would have been entitled to take the interest of any son who died unmarried and one-

half of the interest of any son who died leaving a widow.[1] The fact that Mrs. Coolidge's death terminated her possibility of reverter was urged before this Court in *Nichols* v. *Coolidge, supra,* as a reason for holding her interest in the trust taxable. The Government's brief stated that "the possibility of reverter * * * is also present in the instant case for it might well be that all the Coolidge children would die without leaving a surviving spouse before the death of the grantor" (Brief for the Appellant at p. 19).

(b) The decedent's death augmented the estate created in the remaindermen. As pointed out above, the interest of the sons was subject to divestment by death during the trust term. It was only upon the termination of the trust by the death of both Mr. and Mrs. Coolidge that the remainders vested in possession and enjoyment in their surviving sons. Had Mrs. Coolidge survived her sons they would have taken no interest in the trust property and their heirs would have been entitled to the corpus of the trust depending upon the provisions of the Massachusetts statute of distribution as the same might exist on the date when the trust terminated. As long as either Mr. or Mrs. Coolidge lived it was impossible to determine who would be entitled to take the corpus of the trust in absolute ownership. Mrs. Coolidge's death eliminated a condition precedent to the vesting of the remainders in her sons and to that extent augmented their interests.

The decision of the Circuit Court of Appeals for

[1] General Laws of Massachusetts (1921), Ch. 190, Secs. 2, 3.

the Second Circuit in the *Flanders* case is therefore in direct conflict with *Nichols* v. *Coolidge, supra.*

Conclusion

It is respectfully submitted that the within petition for a writ of certiorari should be granted.

UNITED STATES TRUST COMPANY OF NEW YORK,
HARRIET BARNES PRATT,
Executors, Estate of Harold I. Pratt, Deceased,
Petitioners,
By ROLAND L. REDMOND,
Counsel for the Petitioners.

ROLAND L. REDMOND,
BEN R. CLARK,
Of Counsel.

2 Wall Street, New York 5, N. Y.
September 20, 1946.

Appendix.

Constitution of The United States:

Fifth Amendment.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1939, 53 Stat. 1:

Section 811. *Gross Estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest. To the extent of the interest therein of the decedent at the time of his death;

* * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a

transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

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OCTOBER TERM, 1946

No. 523

ESTATE OF HAROLD I. PRATT, DECEASED, UNITED STATES TRUST COMPANY OF NEW YORK AND HARRIET BARNES PRATT, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing (R. 71–86) and dissenting (R. 86–88) opinions in the Tax Court are reported in 5 T. C. 881. The opinion of the circuit court of appeals (R. 101–102) is reported in 156 F. 2d 235.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 27, 1946 (R. 103–104). The petition for a writ of certiorari was filed

on September 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1903, the decedent established a trust, reserving the income for life and also the right to get back the corpus if he should survive two individuals. He survived one of them and died in 1939. The Commissioner included the trust corpus in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, which applies to a transfer intended to take effect in possession or enjoyment at or after the grantor's death. In upholding the Commissioner, the Tax Court and the circuit court of appeals both held that there was no constitutional objection to the tax, even though the trust was created before the enactment of the estate tax law. Is such holding correct?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 8–14.

STATEMENT

The Tax Court found the following facts (R. 71, 73–74):

The decedent, Harold I. Pratt, was born on February 1, 1877. He died testate on May 21, 1939. (R. 71.)

By indenture of trust executed in the State of New York under date of January 15, 1903, the decedent transferred certain property in trust for the benefit of himself and remaindermen. Under the terms of this indenture, the trust term was measured by the lives of Morris Pratt and Mary Richardson Babbott (now known as and hereinafter referred to as Mary Richardson Babbott Ladd) and the survivor of them; and during the trust term the trust income, so far as here material, was to be paid as follows: To the decedent during his life; and upon the decedent's death, if issue of his survived him, to such of his issue as should from time to time be living, in equal shares, *per stirpes;* and, if the decedent left no issue surviving him, to such of his seven brothers and sisters as should from time to time be living and the issue of any of them that may have died leaving issue, in equal shares, *per stirpes.* The trust indenture further provided that, upon the termination of the trust term, the principal of the trust was to be transferred as follows: To the decedent if then living; and if the decedent should then be dead leaving issue then living, to such issue *per stirpes;* and if the decedent should then be dead leaving no issue, to his brothers and sisters him surviving and the issue of any of them as should then be dead, *per stirpes.* (R. 73–74.)

At the time of the decedent's death, Morris Pratt, who was born on November 29, 1885, was

deceased, but, at that time, and also on the applicable optional valuation date, Mary Richardson Babbott Ladd, who was born on April 27, 1887, was living, and the trust had not terminated. (R. 74.)

The Tax Court upheld the Commissioner's determination that the value of the trust assets was includible in the decedent's gross estate (R. 84). Six judges dissented (R. 88). The court below affirmed, *per curiam* (R. 102).

ARGUMENT

At the outset, it should be noted that the taxpayers make no contention that the instant transfer would not be taxable, and the entire trust corpus includible in the gross estate under Section 811 (c) of the Internal Revenue Code (Appendix, *infra,* p. 8, as a transfer intended to take effect in possession or enjoyment at or after death (*Helvering* v. *Hallock,* 309 U. S. 106; *Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113), if the trust had been established after September 8, 1916, the date of the enactment of the federal estate tax statute. Moreover, it is not questioned that the law specifically provides, in Section 811 (h) (Appendix, *infra,* pp. 8–9), for inclusion of transfers of this character which were made prior to its adoption. And the regulations (T. R. 105, Section 81.17, Appendix, *infra,* p. 10) contain a similar provision. The sole contention made

in the courts below, and here, is that Section 811 (c) cannot constitutionally be applied in respect of a trust created prior to the adoption of the law.

In deciding this issue in the Commissioner's favor, the court below followed its own prior decision in *Commissioner* v. *Flanders,* 111 F. 2d 117, with respect to the constitutional point, although it pointed out that the rule there laid down for valuing the settlor's interest in the trust property was shown to have been too favorable to the taxpayer in *Commissioner* v. *Estate of Field, supra.* The court below also referred to *Matter of Pratt,* 262 App. Div. 240, affirmed, 289 N. Y. 621, in which the New York courts were called upon to decide the same question in reference to the New York estate tax. They upheld the tax and said that it could not be avoided on grounds of retroactivity.

We submit that the instant decision is clearly correct. The situation here differs from the one in *Nichols* v. *Coolidge,* 274 U. S. 531, upon which the taxpayers place their chief reliance (Pet. 4–10). In that case, the only significance of the settlor's death was to mark the date of the distribution of the property; consequently, the settlor's death did not take from her an interest in the corpus or augment the interests of the remaindermen. The transfer was completed prior to the adoption of the law and the decedent retained no possibility

of reversion, such as is here involved, which would hold in suspense and delay until her death or thereafter the ultimate possession or enjoyment of the trust property. Here there was such a retained interest, and in view of this, there is no constitutional obstacle to the tax.

This Court has upheld the estate tax in comparable situations in *United States* v. *Jacobs,* 306 U. S. 363, 366–371, relating to joint tenancies, and *Fernandez* v. *Wiener,* 326 U. S. 340, 355–359, relating to community property. The decisions in those cases make it plain that where, as in the instant case, the decedent's death results in an accession to the property rights of the donees, then the tax cannot be avoided on constitutional grounds even though the transfer was made prior to the passage of the law.

The taxpayers' suggestion (Pet. 7) that the decedent here, like the decedent in *Nichols* v. *Coolidge, supra,* could not reasonably have anticipated the tax when he made the transfer in 1903, should be considered in the light of the circumstances which show that the decedent lived for many years after the adoption of the law in 1916 and had ample opportunity, if he had wished to do so, to relinquish his reversionary interest and thus free his estate from liability. Cf. *Commissioner* v. *Chase Nat. Bank,* 82 F. 2d 157, 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *Gwinn* v. *Commissioner,* 287 U. S. 224, 228–229.

The taxpayers say (Pet. 8–9) that there was also a possibility of reversion in *Nichols* v. *Coolidge,* so that it cannot be distinguished from the instant case. This contention is contrary to our understanding of the facts in *Nichols* v. *Coolidge.* As we read the case, the property was to pass inevitably to the children or their next of kin. See *Coolidge* v. *Nichols,* 4 F. 2d 112, 113 (D. Mass), affirmed, 274 U. S. 531. And if there was, in fact, a possibility that the grantor might reacquire the property by inheritance from the children if she outlived them it was not equivalent to a possibility of reversion, resulting from a gap in the disposition made by the grantor, and did not preclude the transfer from being absolute. See 4 F. 2d at 115.

CONCLUSION

The decision is correct, and there is no conflict. In the light of these considerations, there is no occasion for any further review in the instant case, and the petition should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
DOUGLAS W. MCGREGOR,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

OCTOBER 1946.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(h) *Prior Interests.*—Except as otherwise specifically provided therein, subsec-

tions (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

* * * * *

(26 U. S. C. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946–10 Int. Rev. Bull. 9]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred in-

terest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

Example (*1*). The decedent at 90 years of age transferred property in trust, providing for an estate for life in his granddaughter, 22 years of age, and a remainder to a child of the granddaughter. It was further provided that the estate in remainder would revest in the decedent if he survived the life tenant. Since the property may revert to the decedent and since the beneficiary taking the remainder must survive the decedent in order to obtain possession or enjoyment of the property, the value of the estate in remainder is includible in the decedent's gross estate. The value of the outstanding life estate is not so includible, since the life tenant need not survive the decedent in order to obtain possession or enjoyment thereof.

Example (*2*). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy

requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

Example (*3*). The decedent, during his life, transferred property in trust, giving the income to his wife for her life and the remainder to his father if living at the wife's death. If not, the property was to revert to the decedent if living, and if not, it was to pass to the decedent's issue and their heirs. If the father's death occurs first followed by the death of the decedent, it would appear at the moment immediately prior to the latter's death that possession or enjoyment of the remainder interest can be obtained only by beneficiaries who must survive the decedent. And since the property may revert to the decedent, requirements (1) and (2) are both satisfied, and the value of the estate in remainder is includible in the decedent's gross estate.

Example (*4*). The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not, it was to pass to his son's heirs. No portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied.

Example (*5*). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

Example (*6*). The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate.

Example (*7*). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his

son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

Example (*8*). The decedent, during his life, transferred property in trust providing for payment of the income to his daughter during the life of the survivor of himself and his wife, and the remainder to his daughter or her issue. The wife was given the unrestricted power to alter, amend or revoke the trust. At the decedent's death, his wife is still living. Here, although it appears immediately prior to the decedent's death that the property may revert by operation of law to the decedent's estate in the event that the daughter and her issue should predecease the decedent and his wife, the first requirement is not satisfied, since the wife can obtain possession or enjoyment of the property during the decedent's lifetime through the exercise of her power to alter, amend or revoke. No part of the property is, therefore, includible in the decedent's gross estate. If the wife had predeceased the decedent, requirement (1) would be satisfied, since it would appear immediately prior to the decedent's death that neither his daughter nor her issue, the remaining beneficiaries, could obtain possession or enjoyment of the property unless they survived the decedent. Under these circum-

stances, the value of the remainder would be includible in the gross estate.

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S. 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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